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No. 07-1550

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SOUTHWESTERN BELL TELEPHONE COMPANY D/B/A AT&T TEXAS,

Petitioner,

v.

TEXAS CABLE ASSOCIATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fifth Circuit correctly determined that an association of incumbent cable operators has standing to bring an "as applied" discrimination claim to a Texas statute that by its terms renders incumbent cable operators ineligible for licenses that are available to other cable operators.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, the undersigned respondents state as follows:

No publicly held company owns an interest of 10% or more in TCA.

Time Warner Cable Inc. is a publicly traded company. Time Warner Inc. owns an interest of 10% or more in Time Warner Cable Inc.

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INTRODUCTION

AT&T asks this Court to review a decision of the Fifth Circuit that, according to AT&T, conflicts with the decisions of two other circuits. The Fifth Circuit's opinion, however, is unpublished. The part that AT&T targets is a footnote that by its terms does not express disagreement with any other court. The meaning of the footnote is in dispute among AT&T's co-defendants. And, under any reading, the footnote does not create a circuit conflict. AT&T's request for plenary review therefore must be rejected. There is likewise no warrant for the "GVR" that AT&T seeks. The intervening decision of this Court to which AT&T points announced no new principles that might cause the Fifth Circuit to change its footnote (much less its result). Thus, a GVR would be pointless.

STATEMENT OF THE CASE

1. Prior to the enactment of the state statute challenged in this litigation, cable operators in Texas were required to obtain permits to provide cable service (so-called "franchises") from the municipalities in whose territory they have cable systems. Municipalities conditioned franchises (which commonly ran for about 15 years) on cable operators' compliance with numerous and extensive regulations. For example, cities required cable operators to wire all neighborhoods in the municipality, to observe customer service requirements, to carry public access channels, and to pay various fees.

In time, the Texas Legislature came to view municipal franchising as a barrier to entry by companies that might compete with existing cable operators. As a result, it enacted the statute under chal-

lenge here, which is known as "S.B. 5."[1] Under that statute, companies wishing to provide cable service may seek a franchise from the Texas Public Utilities Commission. Holders of state-issued franchises are subject to only light regulation.

The statute specifically provides, however, that an incumbent cable system that already has a municipal franchise is ineligible for a state-issued franchise until its municipal franchise expires.[2] One might think that the Texas Legislature treated cable operators with existing municipal franchises disparately lest it upset the reliance municipalities might have placed in existing franchises. But that is incorrect: S.B. 5 specifically permits any cable system that is "not the incumbent cable service provider and serves fewer than 40 percent of the total cable customers in a particular municipal franchise area" to renounce its municipal franchise and obtain a state-issued one.[3]

Believing S.B. 5 to work unlawful discrimination, the Texas Cable and Telecommunications Association ("TCTA," which has since been renamed Texas Cable Association, or "TCA") brought this action in federal district court. TCA's complaint asserted (among other things) that its members are incumbent cable operators, that any discrimination among cable operators raises issues under the First Amendment and the Equal Protection Clause, and

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[1] S.B. 5, 79th Leg., 2d Sess. (Texas 2005).

[2] *See* Tex. Util. Code Ann. § 66.004(a).

[3] *Id.* § 66.004(b). "Incumbent cable service provider" is defined as "the cable service provider serving the largest number of cable subscribers in a particular municipal franchise area on September 1, 2005." *Id.* § 66.002(7).

that S.B. 5 fails applicable scrutiny. The district court, however, dismissed TCA's complaint on the theory that TCA had failed to plead that its members had sustained injury-in-fact. Pet. App. 25a.

TCA appealed to the Fifth Circuit, arguing that, when a plaintiff challenges a statute that by its terms grants a special benefit to some parties but withholds it from the plaintiff, the denial of the right itself constitutes injury-in-fact. In a unanimous, unpublished, opinion, the Fifth Circuit agreed: "Discriminatory treatment at the hands of the government is an injury long recognized as judicially cognizable. And such injury is recognizable for standing irrespective of whether the plaintiff will sustain an actual or more palpable injury as a result of the unequal treatment under law or regulation." Pet. App. 14a (internal quotation marks, brackets, and citation omitted). This part of the court of appeals' opinion is not at issue here.

2. In a footnote that is the target of the petition, the court of appeals addressed a separate argument for affirmance on an alternative ground that had been advanced by one of S.B. 5's beneficiaries, AT&T, which had intervened as a defendant alongside the State.

In the district court, AT&T had filed a motion to dismiss arguing that TCA's challenge constituted a "facial challenge" that failed entirely if the statute could be validly applied in even a single setting. AT&T argued that the statute could be validly applied to an incumbent cable operator whose municipal franchise is less onerous than a state-issued franchise and to an incumbent cable operator who faces no local cable competition.

After the district court dismissed the complaint on grounds of standing, AT&T revived its "facial challenge" argument in the court of appeals as an alternative ground for affirmance. But, perhaps because appellate courts are not required to address alternative grounds, and perhaps concerned that the court of appeals would have no interest in reaching the merits when the district court had not, AT&T portrayed its argument as raising only threshold issues. Thus, AT&T argued that, to prevail, a facial-challenge plaintiff not only must convince the court that the challenged measure cannot validly be applied in any setting, but also must *plead* as much in his complaint.[4] In addition, AT&T argued, the plaintiff must have standing to challenge the measure in every setting.[5]

The court of appeals reached only the standing argument, rejecting it in footnote 4 of its opinion:

> We will . . . briefly note further arguments that defendants make regarding standing. Each lacks merit.
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> . . .
>
> The defendants . . . argue that the TCTA has mounted a facial challenge; it therefore must show injury in every application of the Act. For standing purposes, the Supreme Court has said that "[w]hen asserting a facial challenge, a party

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[4] *See, e.g.*, AT&T's Fifth Circuit Br. at 31 ("TCTA did not plead that SB 5 disadvantages incumbent cable operators in all applications").

[5] *See, e.g., id.* at 1 (arguing that district court properly dismissed complaint because TCA "did not allege or attempt to show that all applications of the statute injure its members").

> seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question. In this sense, the threshold for facial challenges is a species of third party (*jus tertii*) standing." *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality opinion). *See also Henderson v. Stalder*, 287 F.3d 374, 385 n.4 (5th Cir. 2002) (Jones, J., concurring); *Thibodeau v. Portuondo*, 486 F.3d 61, 71 (2d Cir. 2007). But the TCTA is only asserting the interests of its members in a representational capacity, rather than the interests of third parties not before the court. The proper inquiry is therefore one of associational standing rather than third-party standing. *Cf. United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 557 (1996) ("Indeed, the entire doctrine of 'representational standing,' of which the notion of 'associational standing' is only one strand, rests on the premise that in certain circumstances, particular relationships (recognized either by common-law tradition or by statute) are sufficient to rebut the background presumption (in the statutory context, about Congress's intent) that litigants may not assert the rights of absent third parties." (footnotes omitted)). In any event, both of the defendants' arguments that the dismissal of the complaint can be justified for failure to satisfy the standards of, first, associational standing, or, second, a facial challenge, lack merit.

Pet. App. 15a-16a n.4.

In the wake of the court of appeals' decision, AT&T asked the Fifth Circuit to rehear the case en banc. None of the Fifth Circuit's judges requested a

vote. Pet. App. 30a. Proceedings in the district court have recommenced.

REASONS TO DENY THE WRIT

I. THIS CASE PRESENTS NO ISSUE MERITING PLENARY REVIEW.

A. If There Were a Conflict of Authority, It Would Not Be Worthy of This Court's Attention.

The heart of AT&T's argument is that a footnote in the Fifth Circuit's opinion diverges from one opinion of the Second Circuit and one opinion of the Eleventh Circuit. But the Fifth Circuit's opinion is unpublished. The opinion therefore does not constitute precedent binding on the Fifth Circuit.[6] A purported circuit split of which one side consists solely of a single unpublished opinion does not merit this Court's review: any such conflict can be resolved without this Court's intervention by the court of appeals that issued the opinion.[7] Although AT&T points (at 27 n.10) to a case in which the Court tackled a circuit split by agreeing to review an unpublished decision, the split involved in that case was

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[6] See 5th Cir. R. 47.5.4 ("Unpublished opinions . . . are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, notice, sanctionable conduct, entitlement to attorney's fees, or the like).").

[7] *See, e.g.*, *Lawrence v. Chater*, 516 U.S. 163, 170 (1996) ("while not immune from our plenary review, ambiguous summary dispositions below tend, by their very nature, to lack the precedential significance that we generally look for in deciding whether to exercise our discretion to grant plenary review").

already well established prior to the unpublished decision.[8] That is not the case here.

Review of an unpublished opinion is particularly inappropriate where, as here, the supposed circuit split does not appear from the face of the unpublished opinion. According to AT&T, footnote 4 of the Fifth Circuit's opinion conflicts with decisions of the Second and Eleventh Circuits. But footnote 4 does not express disagreement with decisions from those courts — to the contrary, footnote 4 cites a Second Circuit precedent with approval.[9] Thus, if there were any conflict, it would be merely implicit, and therefore particularly unlikely to generate persistent disagreement among the circuits.

B. There Is No Conflict of Authority.

Besides, there is no conflict of authority — AT&T misapprehends both the opinion of the Fifth Circuit and the opinions of the Second and Eleventh Circuits.

1. AT&T Misreads the Fifth Circuit's Opinion.

As explained above, AT&T made two arguments in the Fifth Circuit. *First*, AT&T argued that a facial-challenge plaintiff not only must convince the

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[8] *See* Petition for Writ of Certiorari at 12, *Things Remembered, Inc. v. Petrarca*, No. 94-1530 (U.S. filed Mar. 10, 1995) (explaining that the unpublished Sixth Circuit decision of which the petitioner sought review followed a position previously adopted by a published Sixth Circuit decision — and also embraced by the Fifth and Seventh Circuits — that conflicted with decisions of the Third and Eleventh Circuits).

[9] *See* Pet. App. 16a n.4 (citing *Thibodeau v. Portuondo*, 486 F.3d 61, 71 (2d Cir. 2007)).

district court that the challenged measure cannot lawfully be applied in any setting, but also must plead as much. *Second*, AT&T argued that a facial-challenge plaintiff must convince the district court (and plead) not only that the challenged measure has no lawful application, but also that the plaintiff would have standing to challenge every application.[10]

AT&T reads footnote 4 as rejecting the first argument: according to AT&T, the court of appeals held that TCTA may "maintain a facial attack on SB 5 notwithstanding that TCTA did not, because it could not, allege that all applications of SB 5 to its members are unlawful." Pet. 12. In fact, however, the court of appeals addressed only the second argument, relating to standing.[11]

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[10] AT&T repeats the two arguments in the petition. *See* Pet. 18 ("TCTA *must allege* that SB 5 is unlawful in all its applications") (emphasis added); *id.* (TCA must show "that all applications of SB 5 disadvantage TCTA's members").

[11] *See* Pet. App. 15a n.4 ("The reasons we have noted above are sufficient to conclude that the district court erred in dismissing the TCTA's complaint for lack of standing and that the case must proceed to the next step. We will, however, briefly note further arguments that defendants make *regarding standing*.") (emphasis added); *id.* 7a ("Several prospective competitors to the TCTA's members join in this [injury-in-fact] argument, but along slightly different lines. Expanding on a brief statement made by the district court, they urge that the TCTA has challenged the Act on its face; as such, the TCTA must show not only that the Act is unconstitutional in all of its applications, *but that it also has caused concrete injury in all of its applications*. The argument continues, asserting that, because of the nature of the TCTA's claims, its failure to state the specific ways in which all or any of its members have been injured *is fatal to a claim of standing*.") (emphasis added).

That the court of appeals limited itself to standing is not surprising: the district court had dismissed the complaint on grounds of standing. The district court never reached the merits, and the main argument on appeal likewise did not involve the merits: the question was simply whether the district court had erred in dismissing TCA's complaint for lack of injury-in-fact. In addition, the court of appeals was not required to reach each of AT&T's arguments for affirmance on alternative grounds.[12] Moreover, it would have been unfair to reach an alternative ground involving pleading requirements raised for the first time on appeal.[13]

As for AT&T's standing argument, the Fifth Circuit correctly rejected it. As the court of appeals noted, this Court has held that, in a facial challenge, a plaintiff may "vindicate not only his own rights, but [also] those of others who may also be adversely impacted by the statute in question."[14] Besides, the

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[12] *See, e.g., Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) ("While it is true that a respondent may defend a judgment on alternative grounds, we generally do not address arguments that were not the basis for the decision below."); *Magallon v. Livingston*, 453 F.3d 268, 273 (5th Cir. 2006) ("The state argues that we may affirm the court's dismissal on alternative grounds. . . . We think these questions are best handled by the court below in the first instance in the event that they arise on remand.").

[13] *See* TCA's Fifth Circuit Reply Br. at 16 ("Affirming on an alternative ground is particularly inappropriate where, as here, an alternative ground hinges on a supposed pleading defect that, if credited, could have been corrected in the district court.").

[14] Pet. App. 16a (quoting *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality) ("When asserting a facial challenge, a party seeks to vindicate not only his own rights,

court of appeals noted, TCA's lawsuit does not seek to vindicate the rights of others, because it is not a facial challenge at all: TCA is "only asserting the interests of its members in a representational capacity, rather than the interests of third parties not before the court."[15]

In reading the court of appeals opinion to reject AT&T's other argument, AT&T is not only wrong but also alone. The defendant proper in this case, the State of Texas, has not sought certiorari. Quite the contrary: it has expressly disavowed AT&T's view, reading footnote 4 merely as relating only to

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but those of others who may also be adversely impacted by the statute in question."). In *Morales*, the dissent expressly agreed with the plurality on this point. *See* 527 U.S. at 80 n.3 (1999) (Scalia, J., dissenting) ("Disagreement over the *Salerno* rule is not a disagreement over the 'standing' question whether the person challenging the statute can *raise* the rights of third parties: under both *Salerno* and the plurality's rule he *can*. The disagreement relates to *how many* third-party rights he must *prove to be infringed* by the statute before he can *win*: *Salerno* says 'all' (in addition to his own rights), the plurality says 'many.' That is not a question of standing but of substantive law.").

[15] Pet. App. 16a; *see also* TCA's Fifth Circuit Reply Br. at 17 ("TCTA's discrimination claims do not constitute a 'facial challenge' in the sense in which that term is used in the cases on which AT&T relies. TCTA's complaint alleges that each of its members is an incumbent cable operator; that Texas has enacted a statute providing benefits to cable operators; that the statute makes one subset of cable operators (incumbents) ineligible; and that, insofar as it does so, the statute violates federal law. TCTA does not rely on the rights of persons other than its members. TCTA does not conjure up hypothetical cases. TCTA does not seek relief going beyond its members. Thus, TCTA's claim is no different from an 'as applied' claim brought by individual TCTA members.").

standing.[16] The district court has likewise indicated that it is leaning that way.[17]

In fact, even AT&T itself does not appear to be fully committed to its broader reading. In the wake of the court of appeals' decision, AT&T urged the district court that, even though AT&T is seeking review on the basis of its broader reading, the other defendants should remain free to defend S.B. 5 on

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[16] *See* Opp. App. 9a-10a ("THE COURT: Do you think the Fifth Circuit reached the facial challenge argument on the merits? [COUNSEL FOR THE STATE]: No. THE COURT: Or only as an adjunct to the standing argument? [COUNSEL FOR THE STATE]: The only thing — only with the — the latter with regard to standing . . . ."); *id.* at 10a ("[COUNSEL FOR THE STATE]: What they said — what they wrote in that footnote, what I remember what they were addressing, particularly I think AT&T but to some extent other defendants, appellees had taking — had — had argued that under the law of standing they have to plead facts that show in every single conceivable application the law would be unconstitutional. And I think that's what they're saying they weren't buying. . . . They weren't saying we disagree with the assertion that this is a facial challenge. I don't see that anywhere.").

[17] *See id.* at 4a-5a ("THE COURT: I do not read the last sentence of Footnote 4 the way you do. I take that in the context of the standing argument that was raised earlier. In the first sentence of that last paragraph in Footnote 4 starts out, the defendants also argue that TCTA has made — that the TCTA has mounted a facial challenge, therefore, it must show every injury — must show injury in every application of the act. And then it goes back into discussing the standing and then ends up — in any event, both of the defendants' arguments that the dismissal of the complaint can be justified for failure to satisfy the standards of first associational standing or second a facial challenge lack merit. I think that's related to standing.").

the basis of a narrower reading.[18] There is no need for this Court to analyze a reading of a court of appeals opinion that is advanced only by an intervenor, and even then only with an apparent view to increase the odds of securing review.

2. AT&T Misreads the Opinions of Other Courts of Appeals.

Even if the Fifth Circuit had rejected AT&T's first argument, there would still not have been a circuit split: AT&T is wrong in suggesting that the Second and Eleventh Circuits have embraced AT&T's pleading argument. Insofar as those courts have said anything about facial challenges, they have merely reiterated the *Salerno* standard — they did not hold that the *Salerno* standard (that the challenged measure cannot lawfully be applied in any circumstance) must be pleaded in the complaint.

Thus, in *Rent Stabilization Association of New York v. Dinkins*, 5 F.3d 591 (2d Cir. 1993), the Second Circuit held that an association's facial challenge on takings grounds to a rent-control regulation failed where the association had conceded that there were valid applications.[19] The court nowhere

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[18] *See id.* at 11a ("[COUNSEL FOR AT&T]: I also want to just point out that . . . AT&T Texas is acting alone in this endeavor in seeking further review. . . . I think it's inaccurate to say that . . . the course we take somehow binds the entire defense side or waives arguments or constitutes some sort of admission that the complaint is something other than it is.").

[19] *See* 5 F.3d at 595 ("The [association] implicitly concedes, as it must, that the [challenged measure] has not abridged the constitutional rights of those landlords who *do* obtain an adequate return from the annual rent increases.").

held that a plaintiff must plead that the measure under challenge is invalid in all possible applications — rather, the court held only that the plaintiff had advanced no argument to that effect.

Incidentally, the consequence of the failure of the facial challenge was not (as AT&T would apparently have it) that the association's complaint had to be dismissed — rather, the Second Circuit simply characterized the association's challenge as an "as applied" claim and analyzed it as such.[20] In doing so, moreover, the court specifically recognized that associations are entitled to bring as-applied challenges to discrimination that appears from the face of a regulation.[21]

AT&T's reliance on the Eleventh Circuit decision, *Georgia Cemetery Association, Inc. v. Cox*, 353 F.3d 1319 (11th Cir. 2003), is even more puzzling. Whereas the Second Circuit at least mentioned the plaintiff's complaint as providing an additional indication that the plaintiff was not arguing that the challenged measure was invalid in all settings,[22] the

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[20] *See id.* at 592 ("we believe that the RSA has asserted only 'as applied' challenges to New York's rent stabilization scheme"); *id.* at 593 (recounting that the district court "found that the RSA's facial takings claims . . . failed to set forth a truly facial attack on the statute"); *id.* at 594 ("We believe that the RSA's complaint alleges only 'as applied' objections to the law.").

[21] *See id.* at 596-97 ("associations do have standing to bring 'as applied' challenges" where a claim that its members "had been denied equal protection depended on a purely legal analysis of the ordinance and of the law of Equal Protection").

[22] *See id.* at 595 (noting that the complaint alleged only that the challenged measure would deprive "many" of the association's members of a constitutionally adequate return).

Eleventh Circuit did not do even that. Rather, it simply held that the defendant had convincingly argued that there were instances in which the statute could be applied lawfully, and that the plaintiff had failed to provide a convincing reply.[23] And, like the Second Circuit, the Eleventh Circuit also held that a plaintiff unable to bring a successful facial challenge may still pursue an as-applied challenge.[24]

AT&T is also wrong in asserting (at 15) that "the decision below adds to the confusion among the federal courts on the threshold question whether *Salerno* remains good law." For one thing, AT&T is wrong in suggesting that the Fifth Circuit cast doubt on *Salerno*'s validity by citing the plurality opinion in *Morales*. The court of appeals relied on *Morales* only for a point relating to standing — not to wade into the debate about the necessary quantum of invalidity. For another thing, other circuits suffer no "confusion" either: the opinions to which AT&T points state only that some of this Court's members have disagreed on the quantum of invalidity that is necessary to support a facial challenge — not that there is conflict among the circuits.

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[23] *See* 353 F.3d at 1322 ("The defendant thus properly argues that the Association cannot make the showing necessary for . . . a successful facial challenge . . . .").

[24] That the Second and Eleventh Circuits did not embrace AT&T's pleading rule is not surprising. There is no sign that the defendants before them advanced the pleading argument that AT&T advances here. Moreover, AT&T's argument appears at odds with the Federal Rules of Civil Procedure, which require a complaint to contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

C. This Case Is Not a Suitable Vehicle for Review.

Quite apart from the absence of any conflict among the circuits, this case would be a poor vehicle to address issues relating to facial challenges: nothing turns on them.[25]

For one thing, as the Fifth Circuit correctly held, TCA's is not a facial challenge but an as-applied challenge. Incumbent cable operators were denied a state-issued franchise by S.B. 5 itself; given that S.B. 5 by its terms makes incumbents ineligible, the discrimination against them is complete.[26] That the discrimination against incumbent cable operators is effected by the statute itself does not make TCA's claim a facial challenge subject to the standard of *Salerno*. AT&T confuses a facial challenge with an

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[25] *See, e.g.*, Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, and Kenneth S. Geller, *Supreme Court Practice* 231 (8th ed. 2002) ("If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied.").

[26] *See, e.g.*, *South Dakota Mining Ass'n, Inc. v. Lawrence County*, 155 F.3d 1005, 1008-09 (8th Cir. 1998) ("Under the plain text of the Lawrence County ordinance, none of the plaintiffs may be granted a new or amended permit for surface metal mining on any of their mining claims within the Spearfish Canyon Area. Because applying for and being denied a county permit for surface metal mining would be an exercise in futility, we will not require plaintiffs to do so before they may challenge the ordinance."); *Sammon v. New Jersey Bd. of Med. Exam'rs*, 66 F.3d 639, 643 (3d Cir. 1995) ("[T]here is no indication that the aspiring midwives possibly could obtain a license . . . . Requiring these women to apply for a license . . . accordingly would serve no purpose. Litigants are not required to make such futile gestures to establish ripeness.").

as-applied challenge to discrimination appearing from the face of the statute.

For another thing, in the wake of the Fifth Circuit's decision, TCA has been joined by an individual plaintiff, Time Warner Cable. There can be no question that Time Warner Cable's claim is an as-applied challenge: Time Warner Cable argues simply that its cable systems in Texas are being discriminated against. There is no authority for AT&T's novel suggestion (at 22, 27 n.11) that even an individual plaintiff seeking to avenge multiple instances of discrimination loses across-the-board if it loses with respect to even a single instance.[27]

Finally, even if the claims brought in this case somehow qualified as facial challenges, it would still make no difference to the outcome in this litigation. AT&T argues that, if TCA's lawsuit is a facial challenge, TCA's complaint must allege that S.B. 5 is unlawful in every application, and that it cannot do so — supposedly because there are two sets of circumstances in which S.B. 5 would be valid. But AT&T misapprehends applicable substantive law: in the two instances that AT&T hypothesizes, S.B. 5 would still be just as unlawful.

First, AT&T argues (at 19) that there may be instances in which a municipal franchise is less burdensome than a state-issued franchise, and that, in those instances, there could not be any unlawful discrimination. But a plaintiff complaining of dis-

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[27] The authorities that AT&T cites for that suggestion (at 22 n.9) held only that a facial challenge fails when the challenged measure is not unlawful as applied to the plaintiff himself — not that, when a plaintiff brings an as-applied challenge to multiple applications, he must prevail on each or lose on all.

crimination need plead and prove only that his treatment is disparate — not that his treatment is in some relevant sense "worse."[28] It is unsurprising that the law does not require the additional showing: it is unclear how a plaintiff could prove that the applies he received are worse than the oranges he desired.[29]

Second, AT&T argues (at 20) that there may be localities in which incumbent cable operators are not subject to competition from an overbuilder. But, under applicable substantive law, that is irrelevant. If S.B. 5 made Catholic cable operators ineligible for state-issued franchises, AT&T could not avoid a finding of discrimination by arguing that some Catholic cable operators are not subject to competition from Protestant cable operators: whether or not

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[28] *See EEOC v. Inland Marine Indus.*, 729 F.2d 1229, 1233 (9th Cir. 1984) ("The essence of disparate treatment is different treatment . . . . It does not matter whether the treatment is better or worse, only that it is different.") (external quotations and parentheses omitted); *United Teachers of Dade v. Stierheim*, 213 F. Supp. 2d 1368, 1373 n.2 (S.D. Fla. 2002) ("Defendants' attempt to create a 'separate but equal' media room for [excluded journalists] does not comport with the case law requiring all news reporters be given equal access to places reserved for the media."); *see also* Pet. App. 14a-15a ("Here, the Act facially discriminates against the TCTA's membership by extending the benefit of a state-wide license to its competitors while denying that same benefit to incumbent cable providers. As *Northeastern* held, such discrimination can constitute an injury because it positions similar parties unequally before the law; no further showing of suffering based on that unequal positioning is required for purposes of standing.").

[29] Besides, as TCA explained below, its complaint does allege that municipal franchises are more onerous than state-issued franchises. *See* TCA's Fifth Circuit Reply Br. at 21.

subject to competition, Catholic cable operators would be treated disparately, and that is enough. Just so here: incumbent cable operators are being treated differently than they would be if they were non-incumbent cable operators, and that discrimination must be justified.

II. THERE IS NO WARRANT FOR A GVR.

Finally, AT&T argues that the Court should grant, vacate, and remand in light of a decision that this Court handed down shortly after the Fifth Circuit's denial of rehearing — *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184 (2008). But this Court GVRs only when there is a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," and where "such a redetermination may determine the ultimate outcome of the litigation."[30] Here, the probability of such a redetermination is non-existent.

The court of appeals addressed an argument that a facial-challenge plaintiff must show standing to challenge every application of the challenged measure, an argument that it rejected on the grounds (1) that a facial-challenge plaintiff has standing to complain of the violation of the rights of third parties (so long as he has standing to complain of the violation of his own rights), and (2) that TCA's lawsuit is not a facial challenge in the first place. *Grange* has nothing to say about the correctness of

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[30] *Lords Landing Village Condominium Council of Unit Owners v. Continental Ins. Co.*, 520 U.S. 893, 896 (1997) (per curiam).

either determination: it does not address either the interplay between standing and facial challenges or the taxonomy of claims as either "facial" or "as applied."

What *Grange* did have to say on the topic of facial challenges broke no new ground. *Grange* merely applied settled principles of law to the facts and circumstances of the case before it. For example, all of the language that AT&T quotes from *Grange* was supported by citations to prior decisions antedating the Fifth Circuit's decision. Thus, there is nothing new for the Fifth Circuit to consider. At best, a GVR would waste the Fifth Circuit's time. At worst, a GVR would become a tool for mischief.[31] There is no warrant for either result.

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[31] *See, e.g., Youngblood v. West Virginia*, 547 U.S. 867, 873 (2006) (Scalia, J., dissenting) ("Those whose judgments we review have sometimes viewed . . . our . . . GVR orders as polite directives that they reverse themselves.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 13, 2008

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS CABLE & TELECOMMUNICATIONS ASSOCIATION,
Plaintiff,

v.

PAUL HUDSON, JULIE PARSLEY, BARRY SMITHERMAN,
Defendants,

TCCFUI, GTE SOUTHWEST INC., SOUTHWESTERN BELL TELEPHONE, L.P., GRANDE COMMUNICATIONS NETWORKS, INC.,
Intervenor Defendants.

[Civil Action No. A-05-CV-721 LY]

Austin, Texas
April 23, 2008

Transcript of Status Conference After Remand
Before The Honorable Lee Yeakel
United States District Judge

Proceedings reported by stenotype, transcript produced by Computer-aided transcription.

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* * *

[5] THE COURT: Well, good morning. We've been up once and we've come back. And I'm sure that all of you have carefully parsed the opinion of the Fifth Circuit and are prepared to tell me exactly what it means and where we are and how we should proceed from here. So I am more than willing.

I'll start with the plaintiff. Mr. Brands, Mr. George, anything you would like to share? This is a status conference. It can be relatively informal. I am mainly interested today in finding out what the positions of the parties are and making a determination of how best to proceed from this point.

MR. BRANDS: Your Honor, very briefly. Our position is that we should simply go ahead with this case. What happened previously is that the defendants raised ten or more defenses, some threshold defenses, some defenses on the merits. Three of those have now been whittled away: standing ripeness, facial challenge or I should say for.

THE COURT: Well, tell me about facial challenge. I'm not sure the way I read this opinion

that has been whittled away. The circuit clearly has held — and it's the law of the case now — that Texas Cable & Telecommunications Association has standing and the allegations in the complaint are ripe to [6] consider. I think the opinion is less lucid when it comes to the discussion of the facial issues. And one thing I would like you to address is with this suit having been filed, as the Fifth Circuit noted the day after the passage of the act, how can it be anything other than a facial challenge?

MR. BRANDS: Your Honor, first of all, I point to the last sentence of Footnote 4 in the opinion on Page 13, which says — and I quote — that the arguments about facial challenge quote, unquote lack merit. And in our view that's the end of that. And it also makes a lot of sense because TCTA is here in a representational capacity. It is simply trying to raise the rights of its members. It is not raising the rights of third parties who are not before the Court.

THE COURT: I do not read the last sentence of Footnote 4 the way you do. I take that in the context of the standing argument that was raised earlier. In the first sentence of that last paragraph in Footnote 4 starts out, the defendants also argue that TCTA has made — that the TCTA has mounted a facial challenge, therefore, it must show every injury — must show injury in every application of the act. And then it goes back into discussing the standing and then ends up — in any event, both of the defendants' arguments that the dismissal of the complaint can be justified for failure to satisfy the standards of first associational standing or second a facial challenge lack merit.

[7] I think that's related to standing. I don't think it disposes of the facial challenge arguments to the act. What — and I get back to what I said earlier. What — what is this case about if it is not a challenge to the act on its face as being unconstitutional?

MR. BRANDS: Your Honor, respectfully, the party that raised this argument, AT&T, Mr. Michael Kellogg, who is not here today, but he raised this argument. He said that this footnote means that the facial challenge argument is now inapposite, as he put it in his petition for rehearing. In other words, Mr. Kellogg apparently has decided to go for broke and has decided not to rest on Your Honor's interpretation and has effectively waived that. In other words, that issue is out of the case and not even a —

THE COURT: So what issue is in the case? What is this case?

* * *

[11] THE COURT: And at this point I'll hear from the defendants, whoever wants to proceed first, Mr. Todd, on where you think we are and what the suggestions of the defendants are.

MR. BRANDS: Thank you, Your Honor.

MR. TODD: Yes, Your Honor. From the state's standpoint, I would suggest there are two ways we could possibly proceed.

* * *

There's a greater ambiguity today as to whether this is an as applied or a facial challenge, and that makes a huge difference. The cri —

THE COURT: Well, tell me about that.

MR. TODD: Yes.

THE COURT: If — if the suit was filed the day after the statute took effect —

MR. TODD: Right.

[12] THE COURT: — it hadn't really been applied to anybody.

MR. TODD: Right.

THE COURT: So distinguish between facial challenge and as applied —

MR. TODD: Certainly.

THE COURT: — challenge here. Because as a general rule, when the legislature passes an act and it's immediately attacked before there's any water under the bridge —

MR. TODD: Right.

THE COURT: — that in my country way of thinking is a facial attack on the challenge. On the statute, that you look at the statute.

MR. TODD: Right.

THE COURT: You need go no farther than the statute to see what its application is going to be and who it's going to affect, and that's a facial attack.

MR. TODD: As of — as a matter of fact, Your Honor, as of the latest live pleading, which is first amended complaint, you go through that pleading, and over and over again it has all the indicia of a facial challenge. A majority of the discussion of facts, quote/unquote, are really descriptions of law. That's — that's a symptom of a facial challenge.

When you look at the relief —

[13] THE COURT: Now Mr. Brands says that you've waived facial challenge.

MR. TODD: Well, now he was referring to AT&T.

THE COURT: Okay.

MR. TODD: Let me make it clear. I think I'm the only one here who hasn't written you a letter.

THE COURT: And that's to your credit.

MR. TODD: Thank you.

THE COURT: Okay?

MR. TODD: The — no, the — first of all, I don't know how you waive whether or not something is facial or as applied. That's kind of a legal determination, and I don't see how you could waive it.

But if you look at the relief, the very first declaration that they ask for is a declaration that the law is illegal, unconstitutional insofar as it empowers the PUC to issue franchises at all. That's facial.

If you look at their counts, they've divided it into four counts. Just as a side note, the federal courts of long says you're — we're really not supposed to be doing this in counts. It's supposed to be more discrete claims. But nevertheless, each one of the counts concludes —

THE COURT: It looks like you ought to title it discrete claim one and discrete claim two instead of —

MR. TODD: Well, actually with —

[14] THE COURT: — count one and count —

MR. TODD: — within each count you can — it actually breaks down. Each count has a couple of claims within it.

But anyway, each one concludes with the statement that the statute is superseded and preempted by federal law.

Now the law of federal preemption of state regulatory statutes is pretty clear now. If a statute's superseded and preempted by federal law, it doesn't matter if the statute does good things or bad things. You can't enforce it, period. And that's the hallmark of the facial challenge.

Really, I didn't find anything in the pleadings, the count — the counts or claims for relief. And then the — the relief stated itself that lends itself very much to as applied. But to the extent that they say that they're bringing an as applied challenge, I think that that requires further analysis because I know our motion to dismiss and certainly the brief I wrote to the Fifth Circuit were premised on the assumption that this is a facial challenge.

If indeed there are the — the first —

THE COURT: Do you think the Fifth Circuit reached the facial challenge argument on the merits?

MR. TODD: No.

THE COURT: Or only as an adjunct to the standing argument?

MR. TODD: The only thing — only with the — the [15] latter with regard to standing — and let me

say this. I also disagree with the statement that standing and ripeness have been removed from the case. All the Fifth Circuit has said is that on the pleadings they have pled standing. They have pled facts that if proven would give them standing to bring this claim.

But also in the decision — and I apologize. I walked away from my office without a copy of the decision. But I remember saying and I remember the statements at oral argument also, that doesn't mean that standing can't be raised again on summary judgment. I mean, all they've said is they've pled standing. So standing is still an issue, a potential issue in the case. It's just no longer an issue on the pleadings.

THE COURT: Well, I will —

MR. TODD: Thank you.

THE COURT: I will just kind of tell you at this stage I'm not really very interested in spending a whole lot more time on standing.

MR. TODD: No, I — and nor am I.

THE COURT: The way I read it, the Fifth Circuit has said that the association is in, and believe me the last thing I want to see on summary judgment is another standing argument. I'm going to let them be here and argue and —

MR. TODD: Sure.

[16] THE COURT: — we're going to the merits with this —

MR. TODD: Sure.

THE COURT: — at this point.

MR. TODD: If we get as far as that, I understand that. That that's just prudent. But I'm saying that the Fifth Circuit addressed its decision only to what was shown by the pleadings, and I think they addressed this as a facial — treat it as a facial challenge.

What they said — what they wrote in that footnote, what I remember what they were addressing, particularly I think AT&T but to some extent other defendants, appellees had taking — had — had argued that under the law of standing they have to plead facts that show in every single conceivable application the law would be unconstitutional. And I think that's what they're saying they weren't buying.

They weren't saying we disagree with the assertion that this is a facial challenge. I don't see that anywhere. And I — they may have left open the possibility that the plaintiffs want to come back and make a — an as applied challenge, but I think that's very different from the challenge they brought.

* * *

[30] MR. STRETCH: Thank you, Your Honor. Colin Stretch on behalf of AT&T Texas. I would just like to make a couple of brief points, if I may.

If I could start just with the Fifth Circuit's decision, and I don't think it was entirely accurate what plaintiff's counsel ascribed to us.

The Fifth Circuit itself emphasized the posture of the case which was a motion to dismiss. We had argued that in light of the facial challenge that TCTA had brought, they had to allege that the

statute is unlawful in all its applications. And they had failed to do that, and it should be dismissed.

We do think that argument was rejected in the Fifth Circuit decision. We think it's wrong. We're seeking further review of that. But that Fifth Circuit decision doesn't somehow transform the complaint into something it's not.

* * *

[31] I also want to just point out that insofar as arguments about waiver were raised, AT&T Texas is acting alone in this endeavor in seeking further review. And so that's another reason why I think it's inaccurate to say that what — the course we take somehow binds the entire defense side or waives arguments or constitutes some sort of admission that the complaint is something other than it is.

* * *